

Where lawyer ethics and the ethics of mediation practice collide

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Legal Representatives in Mediation & Mediators -

Are they on a collision course?

Mediator objectives

- Generally, a mediator's primary goal is to achieve agreement between the parties.
- S/he may be motivated by the desire to:
 - promote the common good of society
 - conform to certain norms and standards.
- Mediators may be motivated by more personal outcomes such as:
 - income, future business
 - status and reputation
 - approval of their constituency (including need to justify requests for funding)
 - desire to speed up, slow down the process.

Underlying propositions

- Rare for mediators to settle cases “just by being there”.
- Mediators become parties to the negotiations into which they enter. They:
 - exert pressure to settle
 - encourage outcomes consistent with their own ideas and interests.
- Must operate within an ethical framework:
- Owe to the parties
 - Duty of competence
 - Duty of confidentiality.

Mediator strategies

- Procedural interventions influence substantive outcome. Examples:
- Opening statements – mediator may:
 - congratulate the parties on choosing mediation.
 - highlight the benefits of settling now, as opposed to settling later.
 - Alert parties to the possibility that they may be unhappy on settlement – “no-one is every 100% satisfied”.

Process Power – identifying and reframing concerns/issues

The mediator can:

- emphasise mutual benefits to be obtained by agreement;
- stress the benefits to other affected parties by amicable resolution;
- identify common ground using terms such as “It seems that you both agree it is better for the children if this matter is resolved now without going to court”.

Process Power - Reality testing

- Mediators can use the “fear-of-the alternative factor” →
- Mediators rely upon and stress alternatives to settlement and hint at the possible negative consequences of failure to agree.
- If they have a legal background, mediators may point to the risks, costs, and “dire” consequences of litigation.
- They may even obliquely (or explicitly) refer to the probable outcome if the matter was to be litigated.
- They might stress loss of control, uncertainty of decision, and the adversarial winner-takes-all nature of the proceedings.

Mediator strategies

- Directly suggest options and proposals for settlement.
- Suggest options indirectly by using hypothetical questions and conditional "what if's".
- Use questions to:
 - create a focal point for discussion.
 - suggest new (or renewed) concentration of focus.
- Provide more opportunity to discuss favoured options, rather than systematically exploring all possible options.

Process/information power – separate meetings

- Separate meetings with the parties offer mediators the greatest opportunity to:
 - capitalise on interpersonal bonds with the parties
 - push parties to make concessions
 - alter parties' perceptions about preferences for particular outcomes
 - Shape, modify, edit information (eg offers/counteroffers).

Exerting pressure to settle

Other techniques to assist parties to cross “the last gap” include:

- Reminding the parties of norms of fairness, reciprocity and equity of exchange.
- Stressing the interdependence of the parties, the importance of maintaining good relations, and the costs of continued conflict especially the costs to third parties such as children.
- Indicating impatience or disapproval, or even anger.
- Declaring an impasse or threatening to withdraw from the mediation (parties face fear of losing choice).

Exerting pressure to settle

- Confronting the parties, using statements such as “Would you be here if you didn’t think mediation was an attractive way to settle?”
- Using personal power to extract an agreement.
- Using silence.
- Holding long sessions that facilitate compromise and wear the parties down.

Legal Representatives

- Duty to the court & the administration of justice
- Duty to client:
 - Act in the best interests of a client: he or she is an advocate for the client.
 - This role is only limited by the lawyer's role as an officer of the court.
 - Sometimes in best interests of client to settle a case.
- Duty to other parties:
 - Act fairly and courteously.

Legal Representatives – legal obligations

- A lawyer should not mislead or deceive a mediator or an opponent (or any other party involved in the mediation).
- A lawyer might be obliged to disclose relevant authorities and legislative provisions to mediators (could do so in separate sessions).
- There is no obligation to disclose other information to mediators.

Legal Representative – legal obligations

- As a general rule, a lawyer does not owe his or her opponent a duty of candour.
- There is no duty to assist one's opponent in any way, except to the extent necessary to observe other duties such as the duty to cooperate.
- A lawyer should cooperate with the mediator and the opponent at least to the extent necessary to observe the mediator's reasonable directions for the conduct of the mediation.

Responding to mediator strategies

1. Do nothing – let the mediator lead.
2. Actively cooperate with the mediator – encourage your client to follow the mediator.
3. Use the same strategies as the mediator.
4. Raise the use of the strategy with the mediator; disclose it and negotiate over its use. Question its legitimacy and desirability.
5. Instruct client not to speak – speak on behalf of client.
6. Interrogate other parties.
7. Walk out.